SERVED: February 22, 1993

NTSB Order No. EA-3798

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of February, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. EDWARD A. BENSON, Respondent.	Docket SE-10683

OPINION AND ORDER

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on September 13, 1990, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator finding that respondent had violated 14 C.F.R. 91.75(a),[2] and

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]§ 91.75(a) (now 91.123) provided, as pertinent:

suspended respondent's commercial pilot certificate for 20 days.[3] Respondent appeals the § 91.75(a) finding, and the Administrator appeals both the reduced sanction and the failure to find a violation of § 91.9. We deny respondent's appeal and grant that of the Administrator. Before addressing the merits of the appeals, however, we address two preliminary matters, one dealing with respondent's filing of a "Supplemental Brief and Response to Administrator's Appeal Brief," after the Administrator had replied to respondent's appeal brief, and the other dealing with a procedural ruling by the law judge.

The Administrator's appeal to the law judge's decision was received November 5, 1990. Any reply from respondent was due 30 days from the appeal's service date. 49 C.F.R. 821.48(d). Respondent, however, filed his supplemental brief (dated May 1, 1991) almost 6 months later. By motion filed May 16, 1991, the Administrator sought to strike that document, claiming it was unresponsive to his appeal, it reargued matters in respondent's appellate brief, it was untimely, and it was unauthorized, good

(..continued)

> (a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained.

No emergency was declared in this case.

[3]The Administrator also had alleged a violation of 14 C.F.R. 91.9, now § 91.13, which provides that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another. The law judge declined to find a § 91.9 violation and, as a result, reduced the sanction from the 60-day suspension the Administrator sought.

cause for a supplemental and out-of-time filing not having been found by the Board. On May 24, respondent filed a motion for leave to file the supplemental brief, arguing that good cause existed. The Administrator again replied in opposition.

We grant the Administrator's motion to strike and deny respondent's motion for leave to file. Respondent's May filing is 5 months late, with absolutely no explanation. Even in his motion for leave to file, respondent contended that good cause exists to accept the late filing, but did not state what the good cause is.

Turning to the second matter, respondent filed a motion at the hearing to compel production of a transcript reproducing respondent's conversation with the departure controller. The law judge denied this request, and respondent here appeals that ruling. We agree with all the reasons cited by the law judge for the denial (see Tr. at 8-9), and therefore affirm his ruling.

First, as noted by the law judge, respondent had initially asked for this material on January 19, 1990. Despite receiving no response, respondent waited almost 8 months -- until the September hearing -- to file a request to compel production.[4] In addition to the untimeliness of the request, the law judge more importantly recognized that the sought transcript did not exist, and that the underlying tape had been destroyed even before

[4]Respondent's counsel stated that other sought materials were received equally late. The law judge properly responded that a motion to compel production should have been filed earlier on the entirety of respondent's request. Tr. at 7, 9.

respondent's first request, pursuant to standard FAA procedures, because there was no timely (within 15 days of the incident) request for preservation. It follows that it was not an abuse of discretion for the law judge to refuse to require production of something that could not be produced.[5]

We also disagree with respondent's substantive claim that the § 91.75(a) violation is not supported in fact or law. Our reasoning, however, differs somewhat from that of the law judge.

Board precedent establishes that, unless other factors beyond a pilot's control, knowledge, or reasonable expectation caused the departure from a clearance, the pilot will be held accountable. See, e.g., Administrator v. Snead, 2 NTSB 262 (1973), Administrator v. McElroy, 2 NTSB 444 (1973), and Administrator v. Dunkel, 2 NTSB 2250 (1976) (when ATC is initiating or primary cause of deviation, complaint will be dismissed; when ATC contributed to deviation, but pilot also did not act with due care, violation will be found but sanction will be mitigated).

[5]Respondent does not argue that the tape still exists. Nor does he seek particular findings or admissions that the Administrator improperly destroyed the tape, and there is nothing in the record that would support such a claim. Moreover, respondent had another avenue to elicit the same information, had he considered it important to his case. There is no indication that he even attempted to subpoena the departure controller with whom the conversation had occurred. Finally, because respondent testified to the substance of that conversation, this testimony is not disputed (see discussion, infra) and the subsequent controller was aware of its content and breadth, we can see no harm to respondent from the absence of this record. Accord Administrator v. Rauhofer, NTSB Order EA-3268 (1991), slip op. at 3-4.

In this case, it is undisputed that respondent, as pilot in command of N9075Q on a passenger-carrying flight, filed an IFR (instrument flight rules) flight plan and obtained an IFR clearance. The departure controller authorized him to deviate from his clearance and maintain VFR (visual flight rules) to avoid clouds.[6] Later in the flight, when the aircraft was handed off to the area of another controller (R-30), respondent changed altitude and route several times without obtaining prior permission from the controller.

Respondent argues alternate theories: that his IFR clearance was cancelled when the departure controller authorized the VFR deviation; and that R-30's instructions did not supersede that of departure control. The law and the record belie these claims.

The parties appear to agree that an initial conversation between respondent and the R-30 controller is critical. That discussion, and another immediately following which we believe equally important, are reproduced here:

TIME	SPEAKER	
2334:20	N9075Q	Salt Lake Center Bonanza niner zero seven five quebec with you one three thousand VFR like to climb on up to one five thousand VFR
2334:31	R-30	November nine zero seven five quebec roger climb and maintain one five thousand understand your [sic] going to maintain VFR
2334:40	N9075Q	Maintaining VFR bonanza seven five quebec

[6]Respondent testified that he was concerned about the possibility of icing.

2334:42	R-30	November nine zero seven five quebec roger maintain VFR through one five thousand

See Exhibit A-3 tower transcript at 5.

Contrary to respondent's argument, the evidence will not support a finding that the departure controller's authorization to deviate from the IFR clearance so as to avoid clouds continued unaltered to the R-30 controller. The R-30 controller's instructions clearly constrained respondent's authority to continue the deviation.

At 2334:31, respondent was authorized to deviate provided he climbed to and maintained an altitude of 15,000 feet. At 2334:42, the controller repeated that authority "through" 15,000 feet. Thus, although he could deviate laterally around clouds, he had little flexibility vertically.[7]

Nevertheless, at four different times respondent deviated from the altitude assigned to him. See Exhibit A-3 transcript at

[7]We, therefore, disagree with the Administrator and the law judge that respondent's lateral route departures violated the amended clearance. See Tr. at 189-190. Consistent with the tower transcript excerpt, the R-30 controller initially authorized respondent to "maintain VFR" to the extent permitted by the controller's other instructions. This instruction was intended to continue to allow respondent to deviate from clouds, and there is no indication in the record that this authority was ever rescinded by the R-30 controller or that all of respondent's deviations from his flight plan were not for this purpose. Reading "maintain VFR through one five thousand" to mean that respondent still had authority to deviate laterally is the only reading that gives meaning to the words "maintain VFR." As discussed infra, our disagreement with this aspect of the initial decision does not affect the validity of the law judge's ultimate conclusion, as respondent also committed altitude deviations from his amended clearance.

24, 26 and 29 (at 2359:36, when respondent was cleared to 13,000 feet, he began to climb from 13,000 feet without prior authority; at 0003:31, respondent was at 15,400 when he was cleared only to 15,000; and at 0007:40 and 0008:37, respondent had descended to 12,700 and 12,600 feet, respectively, when he was cleared to 13,000). Respondent does not dispute the accuracy of the tower transcript. These altitude deviations constitute unauthorized departures from his clearance and warrant a finding that § 91.75(a) was violated.[8]

For respondent's position to prevail, he would have had to cancel his IFR clearance.[9] He never did so, and ATC cannot do it for him. Thus, respondent was still flying pursuant to his IFR clearance and flight plan, as amended by R-30.

The tower transcript also supports a finding that respondent was aware of his IFR status. Even aside from his specific acknowledgments (see Exhibit A-3 at 19, 26), respondent should have been well aware that, were he flying VFR as alleged, he

[8]Respondent contends (Tr. at 162) that his altimeter may have been faulty. However, this allegation is supported with no documentary evidence (such as repair receipts) or independent testimony. And, the record better supports a conclusion that, as respondent has argued throughout, these deviations were purposeful -- to avoid clouds. Moreover, the record shows upward deviations after respondent had requested and been denied a higher altitude. See Exhibit A-3 at 29. (R-30 granted the sought deviations where traffic permitted. See, e.g., id. at 19.)

[9]If he had cancelled his IFR clearance, he also would have had to comply with other Federal Aviation Regulations, such as § 91.155's requirement that the flight be a certain distance from clouds. Our conclusions do not rely on this issue, although we note that there is no evidence in the record that he was aware of, familiar with, or in compliance with this rule.

would have had no need to seek, as he did, permission for any altitude change. He, however, contacted R-30 on a number of occasions to do so. Id. at 11, 16, 19, 23-27, and 29-30.[10] Accordingly, both the record and case law support the law judge's finding that respondent violated § 91.75(a).

The Administrator seeks reconsideration of the law judge's refusal to find that respondent violated § 91.9. We agree with the Administrator's analysis, and amend the initial decision to include such a finding. As the Administrator notes, a § 91.9 violation need not be independent, but may be residual to, an operational violation. See Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there. There is also no question but that respondent's conduct was a potential hazard to aircraft separation (as the R-30 controller stated, for example, at 2359:47).

Finally, we must address the matter of sanction. The law judge reduced the suspension from the proposed 60 to 20 days. The Administrator seeks at least a 30 day suspension. We must take into account our modification of the law judge's findings of fact (limiting the clearance deviations only to the altitude deviations). The addition of the § 91.9 finding, however, has no

[10]Even had respondent not understood that his IFR clearance could be modified to allow those VFR deviations authorized by the controller and that his clearance would not be "cancelled" during such deviations, his ignorance would not excuse the violation. Administrator v. Hinkle, 3 NTSB 1044, 1045-1046 (1978). See also Administrator v. Day, 3 NTSB 1084, 1086 (1978) (by his actions, respondent demonstrated a fundamental lack of understanding of the ATC system; 6-month suspension imposed and written, oral, and flight testing required).

effect on sanction. Administrator v. Buller, NTSB Order EA-2661 (1988). The Administrator has shown that the 30 days requested is within the range imposed in the past, and under Administrator v. Muzquiz, 2 NTSB 1474 (1975), we have no basis in the record to modify this amount.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's motion for leave to file a supplemental brief is denied;

2. The Administrator's motion to strike respondent's supplemental brief is granted;

3. Respondent's appeal is denied;

4. The Administrator's appeal is granted;

5. The initial decision is affirmed and modified to the extent set forth in this opinion; and

6. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[11]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[11]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).